In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-39

HEINZ WABNIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A grand jury in the Eastern District of New York returned an indictment against petitioner and two co-defendants, Sanza and Sampayo, charging theft of a foreign shipment, in violation of 18 U.S.C. 659, and conspiracy to steal a foreign shipment, in violation of 18 U.S.C. 371. At a pre-trial evidentiary hearing, the district court granted petitioner's motion to suppress two cartons of stolen watches seized by police in a search of petitioner's automobile. The government appealed pursuant to 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. A).

The relevant facts are stated in the opinion of the court of appeals (Pet. App. A2-A5). After dark on

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the evening of November 25, 1969, officers Harz and Bichko of the New York Port Authority Police were sitting in an automobile in the parking lot of the BOAC cargo building at Kennedy International Airport in New York. The officers were there to observe a BOAC employee in connection with an unrelated matter. At 7:10 p.m., petitioner and Sampayo drove into the lot in a black Comet automobile and stopped approximately twenty feet from the officers' car. Several minutes later, the officers saw a white Ford station wagon, bearing a Pan American Airways insignia, enter the lot and pull up directly behind the Comet. Petitioner and Sampayo got out of the Comet and hurriedly transferred to the trunk of their automobile two cartons from the rear of the Pan Am car. The driver of the Pan Am vehicle remained behind the wheel; no one spoke during this transfer, nor were any documents exchanged.

On observing these activities, the two officers got out of their car and walked toward the Comet. As they approached, the Pan Am station wagon backed up and drove away. Petitioner and Sampayo attempted to drive away in the Comet, but were stopped by the officers. Officer Harz identified himself and asked petitioner, the driver, to open the car's trunk. When the officers found two cartons bearing Pan Am waybills inside the trunk, they arrested petitioner and Sampayo.

At the time of the arrest Officer Bichko had been assigned to Kennedy Airport about eight years; Officer Harz had been assigned there about two years.

Both officers testified that the transfer of cartons from the Pan Am car in the BOAC parking lot immediately aroused their suspicions, since Pan Am cargo was normally transferred only at Pan Am's own facilities. In their entire experience at Kennedy Airport, the officers had never before observed such a transfer.[1]

Officers may stop and search an automobile which, in light of circumstances known to them, they reasonably believe to contain stolen goods. *Carroll* v. *United States*, 267 U.S. 132, 149. *Coolidge* v. *New Hampshire*, No. 323, Oct. Term, 1970, decided June 21, 1971, slip opinion at 14–15. Here, the Pan Am car in the BOAC lot, the obviously prearranged rendezvous, and the hurried transfer of cartons at night without conversation or exchange of documents, gave the officers, who were thoroughly familiar with normal air freight procedures, strong reason to believe that they had witnessed a transfer of stolen goods to petitioner's car. As noted by the court below (Pet. App. A5), in determining whether there was probable cause for the action taken by the officers, "[t]he test is whether ordinary, reasonable men, possessed of the experience and knowledge of these detectives would conclude that the transaction described above was more likely than not a criminal transac-

[1] An official of Pan American testified (Pet. App. A4) that the airline does not deliver cargo; that Pan Am station wagons are not used to move cargo; that consignees may pick up cargo only at the Pan Am cargo building; that the BOAC parking lot is not near any route employed by Pan Am cargo vehicles; and that the BOAC lot is never used for authorized transfers of Pan Am cargo.

tion." From the facts of this case, such a conclusion seems inescapable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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